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IN THE

Supreme Court of the United States

October Term, 1963.

No. 361

L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; and FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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L. R. JACKSON AND BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustees under the Will of G. A. Richards, Deceased; and FRANCES S. CARTMELL (formerly Frances S. Richards and Frances S. Parker), as Executrix of the Will of said decedent,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 15, 1963.

Opinions Below.

The opinion and concurring opinion of the United States Court of Appeals for the Ninth Circuit printed in Appendix A, *infra*, pp. 1a-10a are reported in .... F. 2d ..... The judgment of said court is printed in Appendix B, *infra*, p. 11a.

Jurisdiction.

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit were entered on May 15, 1963. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

The question presented by this petition is whether the Court of Appeals for the Ninth Circuit should have followed an earlier decision of the Court of Appeals for the Fifth Cirucit (*United States v. First National Bank & Trust Co. of Augusta*, 5 Cir. 1961, 297 F. 2d 312, Appendix E, *infra*, pp. 14a-24a and held that vested support payments to a California decedent's widow, which were paid from decedent's separate property, were allowable as a deduction under the Marital Deduction provisions (Sec. 812(e)) of the 1939 Internal Revenue Code, as amended, in computing the federal estate tax due by reason of the decedent's death.

Statutes Involved.

The provisions of Section 812(e) of the Internal Revenue Code of 1939, as amended, are set forth in Appendix C, *infra*, p. 12a. The provisions of Sections 680 through 682 of the California Probate Code are set forth in Appendix D, *infra*, p. 13a.

Statement.

George A. Richards, a fesident of the County of Los Angeles, California, died testate on May 27, 1951, leaving surviving his widow, Frances S. Richards, and a daughter, Rozene Richards Moore. Decedent's will was duly admitted to probate and on June 19, 1951, his widow duly qualified as executrix thereof.

On June 30, 1952, pursuant to Section 680 of the California Probate Code, the Superior Court of the State of California for the County of Los Angeles ordered that the executrix be authorized and directed to pay to herself individually, as surviving spouse of the decedent, the sum of $3,000 per month from the corpus of the estate for her support and maintenance, beginning as of May 27, 1951, and continuing until further order of the court, but not to exceed a period of 24 months.

On the date of said court order, June 30, 1952, $42,000 (14 monthly payments of $3,000 each) of support allowance was then due and payable to decedent's widow. Said $42,000 and an additional sum of $30,000, or a total of $72,000, was in fact paid to Mrs. Richards from the corpus of the estate, which was the separate property of the decedent.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate and paid the tax shown due thereby. On the Return the executrix claimed a deduction of the $72,000 support payments under Section 812(e) of the Internal Revenue Code of 1939, as amended (the Marital Deduction provisions). The Internal Revenue Service, upon audit, disallowed the deduction. The executrix then paid the additional tax, together with interest thereon, which resulted from the disallowance of the deduction, and filed a claim for refund therefor.

Following disallowance of the claim for refund, the executrix filed suit for refund. The United States moved for a summary judgment, and the United States District Court for the Southern District of California, Central Division, granted the motion, holding that none

of the support payments to decedent's widow were deductible under the Marital Deduction provisions of the Internal Revenue Code of 1939, as amended (Sec. 812(e)), in computing the estate tax. Taxpayer contended that not less than the $42,000 portion of the support payments which vested on the date of the court's order should be allowed as a deduction.

On the appeal to the United States Court of Appeals for the Ninth Circuit, the taxpayer urged that support payments which are vested in a surviving spouse do not constitute a terminable interest and should be allowed as a deduction under the Marital Deduction provisions. It was taxpayer's position, as held by the Court of Appeals for the Fifth Circuit in *United States v. First National Bank & Trust Co. of Augusta, supra,* that state law is determinative as to whether support payments are vested; that under California law a support allowance *which is due and payable as of the date of the court order granting it is indefeasibly vested* in the surviving spouse as of said date; that the date of the court order granting the support allowance is the applicable date for the determination of whether it is vested under the Marital Deduction provisions; that said rule gives effect to the expressed intent of Congress; and that in the instant case the $42,000 which was due and payable on the date of the court order was then vested in decedent's widow and should have been determined to be deductible under the Marital Deduction provisions.

In the Court of Appeals the United States contended that in determining whether an interest in property is a terminable interest under Section 812(e), the critical point of time is the instant of the decedent's death;

and, in the alternative, that viewing the situation as of the date of the court order, the widow's allowance in question was a terminable interest.

The Court of Appeals affirmed the decision of the District Court, concluding: "Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow." (p. 9a). The fact is that under California law decedent's widow's right to the $42,000 vested portion of the award would have survived her death or remarriage and would not have terminated. (*Estate of Blair v. Ruoff*, 42 Cal. 2d 728 (269 P. 2d 612 (1954)); *In re Lux*, 114 Cal. 73 (45 Pac. 1023 (1896); 1 Condee *California Probate Court Practice*, Sec. 464; *3 Bancroft's Probate Practice*, 2nd Edition, Sec. 732.)

Reasons for Granting the Writ.

1. The decision in the instant case is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. First National Bank & Trust Co. of Augusta, supra.* In the *First National Bank & Trust Co. of Augusta* case, the allowance in question was found to be vested in the widow on the date of the court order granting it under the applicable Missouri law (p. 315). In the instant case the allowance similarly vested in the widow on the date of the court order under the applicable California law. (*Estate of Blair v. Ruoff, supra; In re Lux, supra.*) The cases are not distinguishable, but the

widow's allowance was held to be deductible in the *First National Bank & Trust Co. of Augusta* case and not deductible by the decision of the Court of Appeals for the Ninth Circuit. The two decisions are in direct conflict.

The decision herein is also in conflict with a number of other decisions, including the following: *Estate of Oliver B. Avery v. Commissioner*, 40 T. C. No. 45; *Candler v. United States of America*, 61-2 USTC par. 12045, aff'd 303 F. 2d 439; *Estate of J. F. Darby v. Wiseman*, 62-2 USTC, 12,111; *Estate of Margaret R. Gale*, 35 T. C. 215 (Acq. I. R. B. 1962-37, 6); *King v. Wiseman*, 147 Fed. Supp. 156; *Estate of Wm. A. Landers*, 38 T. C. No. 83; *Molner v. United States of America*, 175 Fed. Supp. 271; *Estate of Wm. Paddock*, 20 T. C. M. 1350; *M. Phelps, Exrx. v. Bookwalter*, 210 Fed. Supp. 801; *United States v. Quivey*, CA-8 1961, 292 F. 2d 252; *Estate of P. D. Rensenhouse*, 31 T. C. 818, on remand, 6 Cir. 1958, 252 F. 2d 566; *Reynolds' Estate v. United States of America*, 189 Fed. Supp. 548; *Estate of Michael G. Rudnick*, 36 T. C. 1021 (Acq. I. R. B. 1962-26, 7). These cases are not distinguishable from the instant case and hold the widow's allowances in question to be deductible. In the instant case a vested allowance was held to be nondeductible, contrary to the decisions of these courts and of the Court of Appeals for the Fifth Circuit.

The decision herein is inconsistent with the general scheme of the Marital Deduction provisions which "Is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her [separate] estate, provided only that the terms of the transfer are such that the prop-

erty will be taxable in the estate of the surviving spouse." *Estate of Pipe v. Commissioner*, 23 T. C. 99, 104, affirmed, 2 Cir. 1957, 241 F. 2d 210, cert. den. 355 U. S. 814 (1957); *Estate of Michael G. Rudnick, supra; Estate of P. D. Reisenhouse, supra; United States v. First National Bank & Trust Co. of Augusta, supra.* The portion of the widow's allowance herein which was fully vested must (and did) pass to the surviving spouse and become a part of, and potentially taxable in, her estate. Under the general scheme of the Marital Deduction provisions, the $42,000 vested portion of the allowance should have been held deductible. (Senate Report No. 2375, 81st Congress, 2nd Session, 1950 U. S. Code Cong. Serv., Vol. 2, p. 3191.) *The view of the Court of Appeals herein would make few, if any, widow's support payments deductible and conflicts with the clearly expressed intent of Congress. (Estate of Wm. A. Landers, supra.)*

2. The conflict presented hereby is important and should be settled. The present situation is chaotic and results in great uncertainty and an appalling lack of uniformity in the application of the Marital Deduction provisions of the Federal Estate Tax Law, as evidenced by a review of the decisions in various jurisdictions. At present support allowances under the statutes of George, Illinois, Maine, Massachusetts, Michigan, Missouri and Oklahoma qualify for the marital deduction,[1]

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[1]Georgia—*United States v. First National Bank & Trust Co. of Augusta, supra; Estate of Candler v. United States, supra; Estate of Landers v. Commissioner, supra.*
Illinois—*Molner v. United States, supra.*
Maine—*Estate of Gale v. Commissioner, supra.*
Massachusetts—*Rudnick v. Commissioner, supra; Paddock v. Commisisoner, supra.*
Michigan—*Reynolds Estate v. United States, supra; Estate of*

whereas allowances under the laws of California, Iowa, Nebraska and Oregon statutes do not qualify.[2] The laws in these jurisdictions and the factual situations in the decisions cited are not substantially different or logically distinguishable.

3. Evidence of this judicial confusion is found in the uncertainty as to the date to which the vesting test should be applied. The Internal Revenue Service in the instant case takes the position that the critical point at which the vesting must be tested is the date of decedent's death, and in this connection cites the language in *Estate of Edward A. Cunha v. Commissioner*, 9 Cir. 1960, 279 F. 2d 292, that "The right to receive a widow's allowance must be characterized according to the attributes it possesses at the instant of the decedent's death." (p. 297). *The First National Bank & Trust Co. of Augusta* case and a number of other decisions, including *Estate of Rudnick, supra*, and *Estate of Gale, supra* (in which cases the Commissioner of Internal Revenue has acquiesced), and *Estate of Landers, supra*, hold that the widow's allowance must be examined as of the ". . . time that the interest arose,

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Rensenhouse v. Commissioner, supra.
Estate of Oliver B. Avery v. Commissioner, supra.
Missouri—*Phelps v. Bookwalter, supra.*
Oklahoma—*King v. Wiseman, supra; Estate of J. F. Darby v. Wiseman, supra.*

[2]California—*Cunha v. Commissioner, supra; Jackson v. United States*, 9 Cir. 1963, ___ F. 2d ___.
Iowa—*United States v. Shafer*, 8 Cir. 1961, 293 F. 2d 629.
Nebraska—*United States v. Quivey, supra.*
Oregon—*United States National Bank of Portland v. United States*, 188 Fed. Supp. 332.

treating that time as being at the time of the court award." (*First National Bank & Trust Co. of Augusta, supra,* p. 316.) The Court of Appeals for the Eighth Circuit in *United States v. Quivey, supra,* stated: "Viewing the situation as of the date of the decedent's death, as must be done for purposes of the marital deduction provisions, the widow had under the Nebraska statute a . . . ." (terminable interest). In the instant case the Court of Appeals assumes ". . . without deciding, that the terminable character of such interest must be determined at the date of the court order . . . rather than at the date of decedent's death . . ." (p. 9a).

An estate consisting of community property is taxed upon but one-half of support payments made to the surviving spouse. Congress by its 1950 amendment of the "family allowance" provisions (Section 812(e) of the Internal Revenue Code of 1939, as amended) intended to integrate the rule in separate property estates with the community property estate rule. If the failure of some courts to give effect to the clearly expressed intent of Congress is to be corrected, and the proper integration of separate and community estate taxation achieved, it is essential that this Honorable Court resolve the existing conflict between the Courts of Appeal for the Fifth and Ninth Circuits. Discrimination against support payments made from separate property estates has continued for too long.

For the reasons hereinabove stated, petitioners pray that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit.

No. 18,128 May 15, 1963

L. R. Jackson and Bank of America National Trust and Savings Association, as Trustees under the Will of G. A. Richards, Deceased; Frances S. Cartmell (formerly Frances S. Richards and Frances S. Parker), Executrix of the Will of said decedent,

Appellants,

vs.

United States of America,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Chambers, Barnes and Jertberg, Circuit Judges.

Jertberg, Circuit Judge:

George A. Richards, a resident of the County of Los Angeles, State of California, died testate on May 27, 1951, leaving surviving him his widow, Frances S. Richards, and a daughter, Rosene Richards Moore. On June 19, 1951, the decedent's will was duly admitted to probate and his widow qualified as executrix of the last will of decedent.

The decedent by his will and the codicils thereto, after bequeathing to his wife personal property consisting of jewelry, automobiles, personal effects, household furniture, etc. and after making certain pecuniary bequests, left the residue of his estate to trustees in trust.

The trustees were required to pay the income of the trust to his daughter for her life after the payment of specific income payments to his sisters and a sister-in-law. His wife was entitled under the terms of the will to income of the trust after the death of the daughter if she survived the daughter. It was further provided that upon the death of the survivor of his wife or daughter, the trust was to terminate excepting the retention of sufficient principal to fulfill the income bequests to his sisters and a sister-in-law if any of them survived the death of both his daughter and wife. The remainder, if his daughter survived his wife, was to pass to the issue of the daughter, but if she had no issue and did not exercise a power of appointment granted her, then to his heirs. In the event his wife survived the daughter, the remainder was to pass according to the provisions of her will, but if no provision was made therein, then to the issue of his daughter, and if the latter had no issue, then to his heirs.

On June 30, 1952, pursuant to Section 680 of the Probate Code of California, the Superior Court of the State of California, in and for the County of Los Angeles, ordered that the executrix be authorized and directed to pay to herself individually as the surviving spouse of the decedent the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance beginning May 27, 1951 and continuing until further order of the court, but not exceeding a period of 24 months.

As of the date of the court order, June 30, 1952, $42,000.00 in family allowance was due and payable to the widow. Said sum and an additional sum of $30,000.00, or a total of $72,000.00, were in fact paid to the widow from the corpus of the estate.

On August 25, 1952, the executrix filed a Federal Estate Tax Return on behalf of the estate, and the tax shown thereon was paid. On said return the executrix claimed a deduction, under Section 812(e) of the Internal Revenue Code of 1939, as Amended (the Marital Deduction provisions), of said $72,000.00. The Internal Revenue Service, upon audit, disallowed said deduction. The executrix paid the additional tax, together with interest thereon, which resulted from the disallowance of said deduction. Following disallowance of a claim for refund, the executrix filed suit for refund of Federal Estate Tax in amount of $29,500.00, plus interest, and for such additional amount by which the Federal Estate Tax due by reason of decedent's death might be reduced by the executrix's costs, expenses and attorney fees incurred in the prosecution of said claim for refund, and the court action to recover the same plus interest thereon.

The district court granted the motion of the United States for a summary judgment in its favor, holding that the amount paid for family allowance was not deductible for Federal Estate Tax purposes under Section 812(e) of the Internal Revenue Code of 1939, as Amended.

On this appeal the taxpayer contends that the District Court erred in holding that the sum of $42,000.00 which was due and payable and paid on the date of the court order to the widow for her support and maintenance was not deductible under Section 812(e) of the 1939 Code, as Amended. In this connection it should be stated that the taxpayer makes no contention that the amount of $30,000.00 in family allowance which accrued and was paid to the widow after June

30, 1952, the date of the court order, is deductible. In fact, taxpayer in its brief states:

> "Only that portion of the allowance to the widow for the period from the date of the decedent's death to the date of the court order is involved. The question presented is whether the $42,000.00 total of family allowance payments which were due and payable on the date of the court order were vested and thus deductible under the Marital Deduction provisions of the Internal Revenue Code."

Section 812(e) of the Internal Revenue Code of 1939, as Amended, provides a marital deduction in computing the Federal Estate Tax.[1] The terminable interest provisions of Section 812(e)(1)(B) of the 1939 Code were carried over into Section 2056(b) of the 1954 Code without any substantial change.

There is no dispute between the parties that the right to widow's allowance is an interest in property passing

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[1] "§ 812 (e). Bequests, etc., to surviving spouse.

"(1) Allowance of marital deduction.

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." 53 Stat. 123, as amended by Revenue Act 1948, c. 168, § 361(a), 62 Stat. 110, 26 U.S.C.A. § 812(e).

"(B) Life estate or other terminable interest. Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest, passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse * * *"

from the decedent within the meaning of Section 812(e)(3) and that the terminable interest rule stated in Section 812(e)(1)(B) is applicable thereto.

There is likewise no dispute between the parties that by the terms of the decedent's will and codicils thereto, the interest in property passing which is under review meets the conditions set forth in Section 812(e)(1)(B)(i) and (ii). Hence, if such interest is a terminable interest within the meaning of Section 812(e) the amount of the value of such interest is not an allowable marital deduction. The critical question, therefore, before us is whether such interest will terminate or fail.

Before attempting to solve such question, we must determine the nature or character of a widow's right to receive an allowance from her deceased husband's estate. Such determination must be made in accordance with local law. See *Estate of Edward A. Cunha v. C.I.R.*, 279 F. 2d 292 (9th Cir. 1960), *cert. denied* 364 U.S. 942 (1961); *United States v. First National Bank and Trust Company of Augusta*, 297 F.2d 312 (5th Cir. 1961); *United States v. Quivey*, 292 F.2d 252 (8th Cir. 1961); *United States Nat. Bank of Portland v. United States*, 188 F.Supp. 332 (1960); *Estate of William A. Landers, Sr. v. C.I.R.*, 38 T.C. No. 83 (Sept. 13, 1962); *Estate of Margaret R. Gale*, 35 T.C. 215 (1960); *Estate of Proctor D. Resenhouse*, 31 T.C. 818 (1959), on remand 252 F.2d 567 (6th Cir. 1958).

Under California law a widow is entitled to a reasonable allowance out of her deceased husband's estate for her maintenance during the progress of the settlement of the estate and which allowance, in the dis-

cretion of the court, may take effect from the date of death.[2] The right to a widow's allowance is purely statutory. *Hills v. Superior Court*, 207 Cal. 266; *Estate of King*, 19 Cal.2d 354; *Estate of Blair*, 42 Cal.2d 728.

The right to a widow's allowance is not a vested right and nothing accrues before the order granting it. *Estate of Blair*, supra. The right to a family allowance is lost when the one for whom it is asked has lost the status upon which the right depends. *Estate of Blair*, supra. If a widow dies or remarries prior to securing an order for a widow's allowance, the right does not survive such death or remarriage. *Estate of Blair*, supra. The amount of widow's allowance which has accrued and is unpaid at the date of death of the widow is payable to her estate, but the right to future payments abates upon her death. *In re Lux*, 114 Cal. 73. The remarriage of a widow subsequent to an order for allowance abates her right to future payments. *Estate of Hamilton*, 66 Cal. 576. A widow's

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[2]Section 680 of the Probate Code of the State of California provides:

"The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

allowance ordered by the Probate Court is payable out of the assets of the estate, in preference to all other charges except funeral charges, expenses of last illness and expenses of administration. *Estate of King*, supra. *Estate of Cunha*, supra.

The June 30, 1952 order of the Probate Court decreed that the widow be paid the sum of $3,000.00 a month from the corpus of the decedent's estate for her support and maintenance, beginning May 27, 1951, and continuing until further order of the court but not exceeding a period of twenty-four months.

The taxpayer concedes that the right to receive an allowance accruing under the court order, after the date thereof, would terminate or fail upon the occurrence of an event or contingency, i.e. the death or remarriage of the widow. It is clear that should either of said events or contingencies occur, the interest in question would not in all events go to the widow or her estate.

However, the taxpayer contends that the right to receive the allowance which accrued on the date of the court order was vested in the widow by such order since neither her death or remarriage would operate to divest her, or her estate, of the right to collect the same from the estate.

The United States takes issue with the taxpayer's position on alternate grounds. Its first position is that in determining whether an interest in property is a terminable interest and whether the conditions set forth

in Section 812(e)(1)(B)(i) and (ii) are met, the situation must be viewed as of the date of decedent's death, and cites in support of such position *Estate of Cunha*, supra; *United States v. Quivey*, supra, other authorites and legislative history. The alternate position of the United States is that, even assuming the situation is to be viewed as of the date of the court award, the interest in property under review is still a terminable interest.

We are unable to embrace the appellant's contention for two reasons. In the first place, the right to receive a widow's allowance in the instant case was a right to receive the same in monthly installments during the progress of the settlement of the estate, which period by court order commenced on the date of decedent's death and extended for a period of twenty-four months. The right to receive the allowance for the specified period is the interest in property passing from the decedent to his widow which is here under review. To uphold the appellant's contention would require us to hold that the interest in property passing may be fractionalized in the manner suggested by appellant into two interests—one vesting at the date of the court order, and the other interest not vesting—by the happenstance of the date of the court order in relation to the date of decedent's death. *Section 680, Probate Code*, supra, contemplates one order for family allowance during the progress of the settlement of the estate but limited in time by the court order. Under the section such order may be made at any time after

the granting of letters of administration or letters testamentary. Under appellant's contention, if the court order in question had been made one month after date of death, only one month's allowance would vest and the monthly allowance for the remaining twenty-three months would not, and if the court order had been made at the end of the twenty-four months fixed in the court order, the entire interest vests. No decision cited to us supports the bifurcation suggested by appellant.

In the second place it appears to us that to hold that the monthly installments which accrued on the date of the court order constituted a vesting of the interest in property passing would be contrary to the holding of this court in *Cunha*, supra, that "the term 'property' used in Section 812(e) as applied to a widow's allowance in California, refers to the assets of the estate and not to the right to receive the allowance." See pages 297-298.

Assuming, without deciding, that the terminable character of such interest must be determined at the date of the court order [in the instant case, made ten months before the expiration of the period] rather than at the date of decedent's death, we hold that the interest in property passing would terminate or fail upon the occurrence of an event or contingency, namely, the death or remarriage of the widow.

In this case the interest which passed from the decedent to his widow was in the corpus of the decedent's

estate in which another interest had passed to decedent's daughter. If for any reason the widow's right to the marital allowance failed, it would not have gone in all events to her estate but it would have served to augment the residuary estate in which the widow had only a limited and terminable interest. In such event a part of such property could be possessed and enjoyed by the daughter. See *Meyer v. United States*, 364 U.S. 410 (2nd Cir. 1960).

The judgment of the District Court is affirmed.

Chambers, Circuit Judge, concurring:

I am unhappy with the above result. But Judge Jertberg's opinion convinces me that I must be unhappy with the statute which I think should be changed. And that, I suppose, is none of my business.

(Endorsed) Opinion and Concurring Opinion Filed May 15, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals
for the Ninth Circuit.

No. 18,128

L. R. Jackson and Bank of America National Trust and Savings Association, et al.,

Appellants,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 15, 1963.

APPENDIX C.

Section 812(e) of the Internal Revenue Code.

Sec. 812. Net Estate.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of Marital Deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

APPENDIX D.

California Probate Code.

Sec. 680. (Right to allowance: Who entitled: Necessity: Duration: Preference: Time of taking effect.) The widow, widower and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which in the case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent.

Sec. 681. (When may be granted: Power of court: Granting prior to inventory: Subsequent granting or modification: Hearing: Notice.) Such allowance may be granted before the inventory is filed, either by the court or a judge thereof; in which case it shall continue until modified by the court. After the inventory is filed the court may grant such allowance, or may modify any allowance made before the filing of the inventory, upon the petition of any person interested and a hearing after notice given for the period and in the manner required by section 1200 of this code.

Sec. 682. (Where parties have other support: Need for allowance as affecting granting thereof.) If the widow, widower, or any minor child has a reasonable maintenance derived from other property, and there are other persons entitled to a family allowance, the allowance shall be granted only to those who have not such maintenance.

APPENDIX E.

Conflicting Opinion.

United States of America,

Appellant,

v.

First National Bank and Trust Company of Augusta, as Executor under Will of J. Adolphus Setze,

Appellee.

No. 18894

United States Court of Appeals, Fifth Circuit. Dec. 13, 1961.

Bell, Circuit Judge.

This appeal involves estate taxes. It is from the judgment of the District Court for the taxpayer. It involves the narrow question of whether the allowance of a year's support to a widow under the law of Georgia in effect at the time of the death of decedent constitutes a terminable interest and thus does not qualify for the marital deduction under § 2056 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 2056.[1]

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[1] 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(b) Limitation in the case of life estate or other terminable interest.—

"(1) General Rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

"(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; * * *."

The decedent died testate on May 26, 1955, a resident of Augusta, Georgia, leaving as survivors, among others, a wife. His will was duly probated and appellee bank qualified as executor. Under the term of the will decedent, after making specific bequests, left three-fourths of the residue of his estate in trust with the income to his wife for life with remainder to others. The will provided that the provisions made for the wife should not deprive her of the privilege of applying for a year's support for herself, and that any such allowance for her support should be charged to the principal of the estate.

On August 8, 1955, the widow made application under the statute[2] of Georgia to the Court of Ordinary of Richmond County, Georgia, for a year's support which was duly set apart to her by order of the court dated September 6, 1955. It consisted of certain bonds valued at $59,604.29 in the aggregate.

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[2]Ga. Code Section 113-1002 (1955 Supp.):

"Among the necesssary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided is the provision for the support of the family, to be ascertained as follows: Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there be one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of 12 months from the date of administration, in case there is administration on the estate, to be estimated according to the circumstances and standing of the family previous to the death of the testator or intestate and keeping in view also the solvency of the estate."

The executor, taxpayer and appellee herein, filed a Federal Estate Tax Return and included this sum as a part of the marital deduction. On disallowance, the taxpayer paid the resulting deficiency and filed a claim for refund, contending that the award qualified for the marital deduction. The claim was disallowed by the Commissioner of Internal Revenue. Thereafter, this suit was timely filed by the taxpayer and the District Court held that the award qualified for the marital deduction. 191 F. Supp. 446 (1961).

Section 2056(a) allows a marital deduction, subject to limitations not here applicable, in an amount equal to the value of any interest in property passing from the decedent to the surviving spouse in computing the federal estate tax, but the deduction is not permitted in cases where the widow receives an interest which will terminate or fail, and also pass to another person in the event the interest of the widow terminates or fails. § 2056(b).

The deduction here involved concerns the award of an interest in Georgia property under the Georgia statute, and hence it must be so examined to determine whether it will terminate or fail. It is undisputed that the interest of the widow under a year's support award in Georgia, once it is made, would not terminate or fail. The Georgia statute provides:

> "Where property is set apart as a year's support for the benefit of the widow alone, she shall thereafter own the same in fee, without restriction as to use, incumbrance, or disposition." Georgia Laws 1937, p. 861, § 113-1023, Georgia Code, 1933.

And in Hiers v. Striplin, 1954, 210 Ga. 293, 79 S.E. 2d 539, the Supreme Court of Georgia held that where property is set apart as a year's support for the benefit of the widow alone, as was the case here, the fee vests in her, and she can make a testamentary disposition of the unconsumed portion thereof.

Regarding the nature of the statutory right to a year's support as distinguished from the award, the court in Farris v. Battle, 1887, 80 Ga. 187, 7 S.E. 262, held it to be a branch of the statute of distribution, and that persons entitled to the right are just as much and as absolutely entitled thereto as they are entitled in the case of intestacy to a distributive share in the residue of the estate of a deceased person. And in Swain v. Stewart, 1896, 98 Ga. 366, 25 S.E. 831, the court said that the right to a year's support vests immediately and absolutely upon the death of the husband in the widow, and her marriage would not deprive her of the right. Also, the right survived her death and could be claimed by her legal representative. Smith v. Sanders, 1951, 208 Ga. 405, 67 S.E. 2d 229.

But the right is subject to certain limitations. It may be waived expressly or impliedly. Federal Land Bank of Columbia v. Henson, 1928, 166 Ga. 857, 144 S.W. 728; or lost by an election to take an inconsistent benefit, Ehrlich v. Silverstein, 1904, 121 Ga. 54, 48 S.E. 703, and it was held to be subject to a twenty year statute of limitation in Nixon v. Nixon, 1943, 196 Ga. 148, 149, 26 S.E. 2d 711; and in May v. Braddock, 1955, 92 Ga. App. 302, 88 S.E. 2d 539, although arising prior to the 1955 act barring the right by death or remarriage of the widow, an award was held to be void where the widow died pending the

award, but no doubt her legal representative could have claimed it. The statute was amended in 1953 to provide a seven year statute of limitation. Ga. Laws 1953, Jan.-Feb. Sess., p. 453.

At this juncture in the Georgia law, the government tacitly admits, the award of a year's support would qualify as a part of the marital deduction because the right was indefeasibly vested. But, says the government, the right is no longer vested because the statute was amended in 1955 to provide a bar to the right if the widow dies or remarries prior to its being set aside, or should she die twelve months after the date of the death of decedent and prior to the filing of an application for the award. Ga. Laws 1955, p. 626.[3]

This amendment is applicable here but we hold, as did the District Court, that it is merely adjective as were the existing limitations on the right, and not substantive so as to convert the right, admitted by the government to be therefore indefeasibly vested at the time of the death of the husband, to one that is defeasible.

We go further, however, in an effort to squarely meet the issue raised by the government, which rests on the assumption that the amendatory bar or limita-

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[3]This legislation was sponsored by the Georgia Bar Association on recommendation of its committee on Real Property and Titles, which committee considered the resulting provisions of the Act to be at variance, and finally succeeded in clarifying the meaning by having it restated as a condition precedent to provide that all applications for year's support shall be made during life and widowhood. The purpose was to obtain a bar or limitation on the right. Ga., Laws 1958, pp. 665-666; Ga. Laws 1959, pp. 138-140; Reports, 72nd Sess. Ga. Bar Assoc., pp. 211-212; 73rd Sess., pp. 189, 193, 194; 76th Sess., p. 186. The 1958 Act also changed the statute of limitations from seven to three years.

tion is substantive. Simply stated, it is that the requirement that the widow be in life and widowhood is such an event or contingency within the meaning of § 2056(b) as will render the award terminable, even when it has been made and has under the statute vested indefeasibly.[4]

To reach this position it is necessary to consider the interest in property passing under § 2056(a) as being the statutory right of the widow to the award at the time of the death of the husband, rather than as being the interest in property itself, once it arises, which is upon the award by the court.

Certain confines have already been marked out by the courts relative to the meaning of § 2056 and its predecessor, § 812(e) of the Internal Revenue Code of 1939 as amended, as they relate to a widow's support allowance. It was first contended that such an allowance was not an interest in property passing from decedent as defined in these sections. Estate of Rensenhouse, 1956, 27 T.C. 107. On appeal, 6 Cir., 1958, 252 F. 2d 566, this position was abandoned by the government, and was not reasserted on remand to the tax court. 31 T.C. 818 (1960). In addition, the government acceded to the position that such an allowance is an interest passing from the estate of decedent within the meaning of the statute in Estate of Edward A. Cunha, 1957, 30 T.C. 812, affirmed 9 Cir., 1960, 279 F. 2d 292, cert. den. 1961, 364 U.S. 942, 81 S. Ct. 460, 5 L.Ed. 2d 373; Molner v. United

[4] That the widow may not assert her right to the award, or that it may be barred by the statute of limitation, or that it may be expressly or impliedly waived, or lost by an inconsistent election are not asserted as being such events or contingencies within the meaning of the statute.

States, D.C.N.D.Ill. 1959, 175 F. Supp. 271; Estate of Margaret R. Gale, 1960, 35 T.C. 215; Estate of Michael G. Rudnick, 1961, 36 T.C. No. 105; Estate of William Lamar Hailey, 1961, 36 T.C. No. 8; and most recently in United States v. Quivey, 8 Cir., 1961, 292 F. 2d 252. Cf. Reynolds' Estate v. United States, D.C. E.D. Mich. 1960, 189 F. Supp. 548; Rev. Rul. 83, 1953—1 Cum.Bull. 395; Rev. Rul. 56-26, 1956-1 Cum. Bull. 447.

Further the rule has been established that the question of the terminability of the interest or award is to be decided upon the law of the state where the interest arose, using the rule of examination of the interest at the time that interest arose, treating that time as being at the time of the court award.

In King v. Wiseman, D.C.W.D.Okl. 1956, 147 F. Supp. 156, a widow's allowance under the Oklahoma law was held not to terminate or abate upon the death or remarriage of the widow and did not constitute a terminable interest; in Quivey, supra, the examination was not made on the basis of the state law that the right was personal to the widow and did not survive her, but on the proposition that the interest or installment award for one year, once made, was terminable because it would fail in the event the widow died or the estate was settled in less than one year; in Estate of Margaret R. Gale, the award to the husband under the Maine law was vested in fee and was therefore nonterminable; and in Estate of Michael G. Rudnick, the widow's allowance under the Massachusetts law would not terminate or fail and thus it qualified as a part of the marital deduction.

As the Tax Court said in Gale:

> "If the allowance, once made, did fail under state law upon the happening or failure to happen of an event or contingency, it constitutes a terminable interest and is nondeductible. If the reverse is true, it is deductible."

Also in Gale and Rudnick, the Tax Court held the award not to be terminable and to qualify as a part of the marital deduction under § 2056(a) in spite of the fact that under the laws of the states involved, Maine and Massachusetts, the right was personal to the widow and would not survive her death, rendering it necessary for the award to be final before her death. The government took the express position in Rudnick that the interest was terminable because the right did not survive the widow. The Tax Court said that the award to the widow which became final before her death was thereby vested, and would become a part of her estate when she died, and the fact that the widow might die before the award became final would not make the award, once made, a terminable interest within the meaning of § 2056(b).

In Quivey, the Court of Appeals for the Eighth Circuit, while deciding for the government and thereby reversing the District Court, 176 F. Supp. 433, stated that all reported estate tax decisions on the question have expressly or implicitly recognized that only where a state statute does not leave a widow's allowance subject to termination can the interest in the decedent's estate qualify as a marital deduction. Georgia falls into this category, and meets this test as the Nebraska statute did not.

In United States v. Trader's National Bank of Kansas, 8 Cir., 1957, 248 F. 2d 667, the commuted cash value of dower and homestead interest, terminable interests under the Missouri law, was awarded to the widow on her election after the death of decedent under a Missouri statute and the court held this to be a nonterminable interest qualifying as a part of the marital deduction. In United States v. Crosby, 5 Cir., 1958, 257 F. 2d 515 a widow under the Alabama statute waived her dower interest in land so that it might be sold, and took an award, as she had a statutory right to do, in lieu of dower out of the proceeds of the sale, thereby converting her right from a terminable to a nonterminable interest which qualified as a part of marital deduction.

But the government, while recognizing that it is necessary to convert the statutory right into an award before it becomes an interest in property passing within the meaning of § 2056(a), would carve out an exception that it is a terminable interest where the state statute requires the widow to be in life and in widowhood to exercise the right.

This will not do. The right is inchoate. It is incapable of transfer or assignment, not subject to lien, or susceptible of valuation. The right holder has no control over the amount of the award under it. It must be claimed while the widow is in life and widowhood, and within the statutory period or it is barred, and it may be lost by taking an inconsistent benefit

or by waiver. Once claimed however, and reduced to certainty by the order of the court in the form of an award, it becomes the subject of examination in the light of state law to determine if it will terminate or fail within the meaning of § 2056(b) if it is claimed as a deduction under § 2056(a). By this standard we hold the Georgia award here to qualify as a marital deduction. It vested indefeasibly.

This accords with the intent of Congress to extend to married taxpayers in common law states by way of the marital deduction, more properly an exclusion, the advantages of residence in community property jurisdictions, but only when so much of the interest allowed as a marital deduction as is not used up will survive as an asset in the estate of the widow, there to be taxed in due course, and the statute is to be liberally construed to this end. The purpose of the terminable interest rule under § 2056(b) is to prevent the deduction of an interest which will not survive. United States v. Crosby, supra. Here the interest survives.

The application of the terminable interest rule to the maintenance allowance for a widow out of the estate of a decedent is entirely dependent, as was said in the concurring opinion in Quivey, on the vagaries of state law. The advantage given to residents of some states, such as Georgia, over those of other states such as California and Nebraska is inherent in the statute. The complexities of the marital deduction are compounded by the fact that every state has statutes of

varying forms designed to protect the decedent's family from economic hardship during the administration of estates. See Berlin and Testa, Deductibility of Widow's Allowance under the Marital Deduction, 36 N.Y.U.L.Rev. 1188 (1961). Congress is aware of this lack of uniformity in the application of the marital deduction,[8] itself created to promote uniformity, and the condition must continue until that body acts, it being their prerogative to make and amend laws. The judgment is

Affirmed.

[8]House Rep. No. 818, 86th Congress, 1st Sess., p. 2; House Rep. No. 1337, 83rd Congress, 2nd Sess., p. 91-2, and Senate Report No. 1622, 83rd Congress, 2nd Sess., p. 125.